United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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76-1025

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United States Court of Appeals

For the Second Circuit

76-1025

UNITED STATES OF AMERICA,

Appellee,

v.

JOSEPH ANTHONY PELOSE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Preliminary Statement

This is an appeal from a judgment dated January 8, 1976, entered in the United States District Court for the Southern District of New York (Griesa, *J.*), convicting Appellant, after jury trial, of nine counts of wilful failure to file corporate tax returns in violation of 26 U.S.C. § 7203 and sentencing him to imprisonment for nine concurrent terms of one year and to pay a committed fine of $45,000. Appellant is at liberty on bail pending determination of this appeal.

Statement of Facts[1]

A. The Issue in Controversy

On November 12, 1976, Joseph Pelose was convicted of nine counts of failure to file federal corporate income tax returns, after a jury trial in the United States District Court for the Southern District of New York before the Honorable Thomas P. Griesa.[2]

Pelose was tried on an information charging that three corporations which he controlled had wilfully failed to file corporate tax returns for pertinent years in which returns were due.[3] It was conceded that the three corporations had gross income in the subject years, that no corporate returns had been filed for said years, and that Pelose was the officer responsible for the filings. The sole substantial issue for the jury was whether or not Pelose acted wilfully when he failed to cause the returns to be filed.

B. The Government's Evidence

1. *Walter Cole*

Cole was retained as the accountant for the subject corporations in the pertinent years (T 43, 44). He testified

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[1] Unless otherwise noted, all parenthetical references herein are to either the trial transcript (with page numbers preceded by the letter "T") or the Appendix (with page numbers preceded by the letter "A").

[2] The case was a close one. The jury, after a short trial involving but a single issue—wilfulness—deliberated almost thirteen hours, asked to have the charge reread in its entirety once (A 79a) and that portion dealing with wilfulness once again (A 84a) and, on one occasion, reported itself "hopelessly deadlocked" (A 73a).

[3] Jeath, Inc. failed to file for fiscal 1969 (Count One), fiscal 1970 (Count Two) and fiscal 1971 (Count Three). Saw Mill Truck Rental, Inc. failed to file for calendar 1968 (Count Four) and calendar 1969 (Count Five). H. V. Development Corporation failed to file for calendar 1968 (Count Six), calendar 1969 (Count Seven), calendar 1970 (Count Eight) and calendar 1971 (Count Nine).

that he neither prepared nor filed federal corporate returns for the companies in the period 1967-1972 (T 46), and that he was unable to obtain the financial information necessary for filing from Pelose or the corporate employees (T 47, 64). He testified that notices and demands from the Internal Revenue Service, which were mailed to him by the corporations, went unheeded (T 67-70). Despite the lack of sufficient financial information for the preparation of tax returns, however, the witness testified that in response to bank demands he did file numerous certified financial statements reflecting corporate operations in the subject years (T 96-100, 113, 122).

Cole testified that throughout his retention (1967-1972) he never requested the IRS to extend the corporations' time to file returns (T 141-142) or advised the IRS of the physical disabilities of Pelose (T 142). The witness was aware of Pelose's illness at least as early as July, 1968 (T 64).

2. *Ronald Rothman*

Rothman, an attorney in the Regional Counsel's office of the Internal Revenue Service, testified to a conference with a representative of Pelose during which the representative, a Mr. Goglio, conceded that Pelose "single-handedly ran" the subject corporations in the pertinent years, that their gross receipts were ample, and that the failure to file the returns was the fault of the accountant, Cole (T 253). On cross-examination, the witness testified that he was also advised of Pelose's laryngectomy and cobalt treatments (T 255), and of his inability to speak as a result of the operation in which his larynx had been removed (T 256).

3. *Benjamin Lewis*

Lewis, a special agent in the Intelligence Division of the Internal Revenue Service, also testified to conversa-

tions with Pelose s representative, Goglio, in which Goglio conceded that Pelose was the responsible officer of the subject corporations from 1966 to 1971.

4. *Harold Parker*

Parker, a certified public accountant, testified that he was accountant for the subject companies from 1964 to 1967. The witness testified that prior to the years which were the subject of the information he prepared corporate returns for Jeath, Inc. in 1964, 1965 and 1966 (T 289), did not prepare returns for Saw Mill Truck Rental in those years (T 293) and had no information reflecting services performed for H. V. Development Corporation (T 294).

5. *Additional Evidence Supporting the Claim of Wilfulness.*

The court, on the issue of wilfulness, permitted the introduction of evidence designed to demonstrate non-filing or late filing of corporate returns for the three subject companies for prior years 1964 through 1967 (T 84-88, 489, 490).

C. The Defendant's Case

1. *Norge Bertolli*

Bertolli, a certified public accountant, testified that he was retained by Pelose in 1974, obtained the financial records of the subject companies for the years in issue and was able to prepare federal corporate tax returns with the information available to him (T 305-308). He testified that had he been in the position that the prior accountant, Cole, had been in, he would have advised the IRS of Pelose's illness and surgery and sought extensions of time in which to file returns (T 316). On cross-examination, the witness testified that he was uncertain whether particular

checks written on the corporations to Pelose and to cash had been reviewed in connection with his preparation of the returns (T 350). These checks were admitted into evidence (T 406).

2. *Debbie Pelose*

Miss Pelose, Appellant's daughter, testified that Pelose suffered an automobile accident which required a back operation in 1966-1967 (T 433). Later, a throat condition required cobalt treatments and, still later, a laryngectomy. She testified to a conversation between Cole and Pelose in which the former assured the latter that the taxes were to be handled and extension requests filed (T 436), and to later conversations in which she was assured by Cole that extensions had been filed (T [illegible]). She testified that she was responsible for opening mail at the corporate offices, and had never seen certain letters previously introduced into evidence by the Government in which Cole advised Pelose of the need for prompt attention to the tax matters involved (T. 437-38).

3. *Sidney H. Leeds*

Leeds, a professor of accounting, testified that the accounting practices employed while Cole was accountant for the corporations did not comport with accepted professional standards (T 452), and that extensions should be sought when illness precludes taxpayer cooperation with an accountant (T 453).

4. *Edwin I. Cleveland, M.D.*

Dr. Cleveland testified that he examined Pelose in April, 1968 and discovered throat cancer (T 469). Cobalt treatments were commenced, impairing his normal functioning (T 470), but the treatments were unsuccessful. As a

result, the doctor advised and carried out a total laryngectomy in September, 1968, and the creation of an opening in the lower neck through which Pelose could breathe (T 473). The operation left Pelose speechless for at least three months (T 480) until esophageal speech was mastered (T 474). The doctor also testified that related surgery was carried out on Pelose's throat in 1970 (T 474).

Dr. Cleveland also testified, from medical records, that Pelose suffered a back injury in 1966 for which an operation was required in December, 1967 (T 469).

D. The Government's Rebuttal Case

In rebuttal, the Government introduced the testimony of Kenneth Tomasevich, Mervin J. Pelton, and William R. Delaney, all of whom recalled business meetings with Pelose in the latter part of 1968 and in 1969 (T 495, 501-502, 510). Tomasevich and Delaney testified that they had difficulty understanding Pelose and that Pelose wrote notes to communicate (T 496, 510).

ARGUMENT

APPELLANT WAS GRAVELY PREJUDICED BY THE TRIAL COURT'S INSTRUCTIONS WHICH: (A) MISSTATED THE LAW ON THE CRUCIAL ISSUE IN THE CASE; AND (B) WORKED A PREJUDICIAL VARIANCE IN THE CHARGES.

I. Introduction

Our brief factual presentation makes clear that the crucial issue in this case was whether Pelose's conceded failure to file tax returns on behalf of his three corporations for the tax years in question was wilful. Any in-

struction to the jury, therefore, which misled the jury on this issue would entitle Pelose to a new trial. Just such an instruction was given.

Each of the nine counts in the information charged that on or about its due date in the pertinent year, Pelose wilfully failed to file the required tax return on behalf of a specific corporation. And 26 U.S.C. § 7203, under which each count was drawn, reads in pertinent part as follows:

> Any person required under this title . . . to make a return . . . who willfully fails to . . . make such return . . . at the time or times required by law or regulations, shall . . . be guilty of a misdemeanor . . . .

Thus, it is clear that in each of the nine counts Pelose was accused of wilfully failing to file the required return on or before the day it was due.

In its charge to the jury, the trial court made the following statement (A 47a-49a):

> Now let me say a word about a subject which I will speak of as the time factor. As I said earlier, the particular tax returns in question were due two and a half months after the completion of the years which they related to. The earliest due dates were for the 1968 returns of Saw Mill and H. V. Development referred to in counts 4 and 6. These returns were due by March 15, 1969. Other returns referred to in other counts were due at various later times. The last of the due dates was for the 1971 return of H. V. Development, referred to in count 9. This return was due by March 15, 1972.
>
> As you know, none of these returns have ever been filed. The information in this case was filed

March 14, 1975. That is, the criminal action was commenced March 14, 1975.

The point I wish to make to you now is this. Let us suppose for purposes of illustration that because of the circumstances of illness, reliance on the accountant or because of some other reason you find that the government has failed to prove that Pelose had the requisite wilfulness back in 1969 and 1970 because perhaps he believed that Cole had obtained extensions. I am not saying that you should find this or not find this; I am simply trying to illustrate a point.

Let us further suppose for purposes of illustration that you find that by a certain time later he was—by "he" I mean Pelose—sufficiently recovered from his illness to handle business affairs, and because of a notice from the IRS or the institution of an investigation by the IRS, or for some other reason, he was at this later time no longer relying on Cole for having obtained extensions and knew that such extensions had not been obtained. Again I repeat that I am not saying that this is what you should find or not find. I am trying to illustrate a point which I think will become clear.

The point is, if you should find in the course of your deliberations that at such later time Pelose wilfully failed to file past returns after learning of the deficiency and the lack of extensions and failed to file the current returns due in 1972 or thereafter, then he would be guilty of wilful failure to file these returns, if you found the wilfulness existent at such later time under circumstances of the kind I have mentioned to you.

In short, despite the fact that the statute makes it a crime wilfully to fail to file the required return on or before the due date and despite the further fact that the information itself alleged that the crimes were committed on or before those very due dates, the trial court informed the jury that it might find Pelose to have committed the crimes charged at any date thereafter.[4]

We submit that this particular instruction, which may very well have been the cause of the jury's verdict,[5] gravely prejudiced Pelose, since it not only stated the law incorrectly but came so late in the prosecution that it took Pelose unaware, to his prejudice.

II. Argument

A. The Court Erred in Its Interpretation of the Statute

In charging the jury that Pelose could be found guilty of a wilful failure to file a particular return long after it was due, the trial court committed grievous error.[6]

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[4] Defense counsel took exception to this portion of the court's charge (A55a).

[5] At trial, there was evidence that the Government had obtained the records of Pelose's corporations in or about March of 1973 and returned them to him sometime in 1974. These dates, of course, were long after the due date of the last corporate return which Pelose failed to file. During deliberations, the jury requested that it be reminded of those two dates (A60a), and so it was.

We suggest that no possible reason for such a request existed other than that the jurors may have felt that there was no wilful failure to file during the periods alleged in the information, but that the circumstances precluding wilfulness ceased at some later time when, according to the instruction, Pelose was required to file, if he were to avoid conviction. The jurors merely wished to know whether, at that later time, Pelose had in his possession the corporate records essential for the filing of those returns.

[6] Although not dispositive of the issue, it is surely persuasive that extensive research has found no case in which such a charge has even been given, much less upheld. Again not dispositive, but again

We note, first of all, that the trial court, in charging as it did, necessarily assumed 26 U.S.C. § 7203 to define a continuing crime, on which the six-year statute of limitations[7] never runs. That assumption is surely incorrect. See, e.g., *Haskell* v. *United States*, 241 F.2d 790 (10th Cir. 1957); *United States* v. *Alper*, 200 F. Supp. 155 (D.N.J. 1961); *United States* v. *Chaif tz*, 181 F. Supp. 57 (D.D.C.), *aff'd*, 288 F.2d 133 (D.C. Cir. 1970), *rev'd in part on other grounds*, 366 U.S. 209 (1961).[8]

Any argument dealing with the propriety of a charge apparently never before given must rely upon analogous *cases. Ours is Toussie* v. *United States*, 397 U.S. 112 (1970). There, a defendant who, in violation of 50 U.S.C. App. § 453, had failed to register for the draft on the required date was indicted more than five years later. His defense was that the statute of limitations precluded his prosecution, a defense rejected both by the District Court[9] and by this Court,[10] on the ground (implicitly relied upon below in the instant case) that defendant's duty was a continuing

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surely persuasive, the Government did not understand the charge to state the law correctly, since it did not include anything like it in its Requests to Charge which, instead, refer to a failure to file "at the time required by law" (No. 2 [A15a]) and "at the required time" (No. 9 [A23a]). Finally, we note that the leading treatises on jury instructions contain nothing under the statute even remotely resembling the charge in this case. See, e.g.: Devitt & Blackmar, Federal Jury Practice and Instructions § 52.27 *et seq.* (2d ed. 1970); 5A Reid's Branson Instructions to Juries § 4188 (1962).

[7] See 26 U.S.C. § 6531.

[8] In fact, the court explicitly contradicted its implicit assumption by charging that the statute of limitations precluded the bringing of charges for Pelose's failure to file or late filing of corporate returns for years prior to those set forth in the information (A49a).

[9] See 280 F. Supp. 473 (E.D.N.Y. 1967).

[10] See 410 F.2d 1156 (2d Cir. 1968).

one.[11] The Supreme Court, on a number of grounds, found to the contrary.

First, at 115, the Court noted that a statute of limitations normally begins to run "when the crime is complete."[12]

Second, at 115, it stated that the "doctrine of continuing offenses should be applied in only limited circumstances" and explained its view in these words:

> These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved in such that Congress must assuredly have intended that it be treated as a continuing one.

No such conclusion is compelled with respect to 26 U.S.C. § 7203, a statement supported by the cases cited above.[13]

Third, the Court noted, at 121, that questions of limitations are fundamentally matters of legislative decision, and pointed out, at 123, that Congress could easily have provided for a longer period of limitations but had not done so.

The *Toussie case,* although dealing with a different statute, strongly supports our argument. Indeed, ours is a stronger case, for in *Toussie,* the Court found that the

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[11] In *Toussie,* the District Court and this Court had held that the duty to register continued in most cases until the potential draftee had reached the age of twenty-six, at which time the statute began to run. Here, according to the trial court, the duty to file might never have ended.

[12] In *Toussie,* the Government had conceded that the crime was complete when the defendant failed to register. See 397 U.S. at 114.

[13] Moreover, at 120, the Court noted that "there is no language in this Act that clearly contemplates a prolonged course of conduct." Nor, we might add, is any such language to be found in section 7203.

statute created no continuing crime, even though regulations promulgated under it provided that the duty to register did, in fact, continue until the prospective registrant had attained the age of twenty-six.

We submit that the crime of wilfully failing to file a return is committed or not on the due date. No citation of authority is needed, for example, to support the proposition that a wilful non-filer's criminality is not absolved by his later filing of the required return. Nor, we submit, can a later state of mind create guilt in a person whose initial failure to file was non-wilful and therefore innocent.

B. The Charge Constituted an Impermissible Amendment of the Information

The giving of the charge constituted reversible error for yet another reason. Each count of the information alleged that a particular corporation, of which Pelose was President, was required to file a return by a particular date and that Pelose wilfully failed to file such a return "within said required time." The trial, of course, was conducted with respect to Pelose's wilfulness or lack thereof on that very date and within that "said required time." Nevertheless, at the very end of the trial and after all the evidence was in, the trial court, by the instruction complained of, materially changed the theory of the prosecution by permitting the jury to convict Pelose for a wilful failure to file not on the due date but many years later.[14] That charge, in effect, amended the information and, we submit, did so illegally.[15]

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[14] Indeed, under the charge, Pelose could have been found guilty of a wilful failure to file on a date after the filing of the information against him.

[15] Had an indictment been involved, the charge would clearly have constituted an illegal amendment. See, e.g., *United States* v. *Goldstein*, 502 F.2d 526 (3d Cir. 1974) (date change of three weeks held substantial and material).

Rule 7(e) of the Federal Rules of Criminal Procedure permits an information to be amended at any time before verdict "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."[16] Here, Pelose's substantial rights were adversely affected, for the variance in the charges so late in the trial prevented him from mounting a proper defense to an allegation he never knew had been made against him. In short, he was surprised by the "amendment," and such surprise constituted prejudice to a substantial right—the right to advance notice of the precise charges against which he had to defend himself. See, e.g., *United States* v. *Blanchard*, 495 F.2d 1329 (1st Cir. 1974); *U.S.A.C. Transport, Inc.* v. *United States*, 203 F.2d 878 (10th Cir.), *cert. denied*, 345 U.S. 997 (1953); *Frederick* v. *United States*, 1663 F.2d 536 (9th Cir.), *cert. denied*, 332 U.S. 775 (1947); *United States* v. *Goldstein*, 386 F. Supp. 833 (D. Del. 1973), *rev'd on other grounds*, 502 F.2d 526 (3d Cir. 1974).

Here, the lateness of the amendment prevented Pelose from showing that, even at such later date, he lacked wilfulness with respect to his conceded failure to file. Perhaps such lack of wilfulness was based upon advice of counsel. Perhaps Pelose, at that later time, was unaware of any obligation to file then—an unawareness which would have precluded wilfulness. See, e.g., *United States* v. *Greenlee*, 380 F. Supp. 652, 659 (E.D. Pa. 1974), *aff'd*, 517 F.2d 899 (3d Cir. 1975).[17]

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[16] As we have already argued, *Toussie* shows that the crime of wilful failure to file is a completed crime, committed, if at all, on the due date. Since the court permitted a finding of guilt to be based on later events, it was including a "different" charge in this information.

[17] The court never charged the jury that Pelose would have to have known of the obligation (if it existed) to file at that later time.

CONCLUSION

For the foregoing reasons, the charge of the trial court constituted reversible error entitling Appellant to a new trial.[18]

Respectfully submitted,

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[18] To the extent that the trial court's charge amended the information and required Pelose to defend against a charge as to which he never received notice, his due process rights were violated.

Service of ~~three~~ five (5) copies of the within
is admitted this 11 day of March 1976

MAR 11 1976
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